In the Supreme Court of the United States.

OCTOBER TERM, 1911.

FRANK TOUSEY, PUBLISHER, A CORPORATION, appellant,
v.
FRANK H. HITCHCOCK, POSTMASTER General of the United States.
No. 251.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEE.

This case, we agree with counsel for appellant, is in every substantial respect like No. 250, with which it is to be heard. There was below some suggestion that there is a difference in the matter of the hearing, the Tousey Company having been cited for the 12th of June and no one appearing for it on that day. We agree with counsel for appellant that there is no significance in this, and that the Tousey Company should not, under the circumstances, be held to have made default. As goes the one case, so should the other go.

For the reasons set forth in our brief and argument in No. 250, this case, we respectfully submit, should be affirmed.

F. W. LEHMANN,
Solicitor General.

MARCH, 1912.

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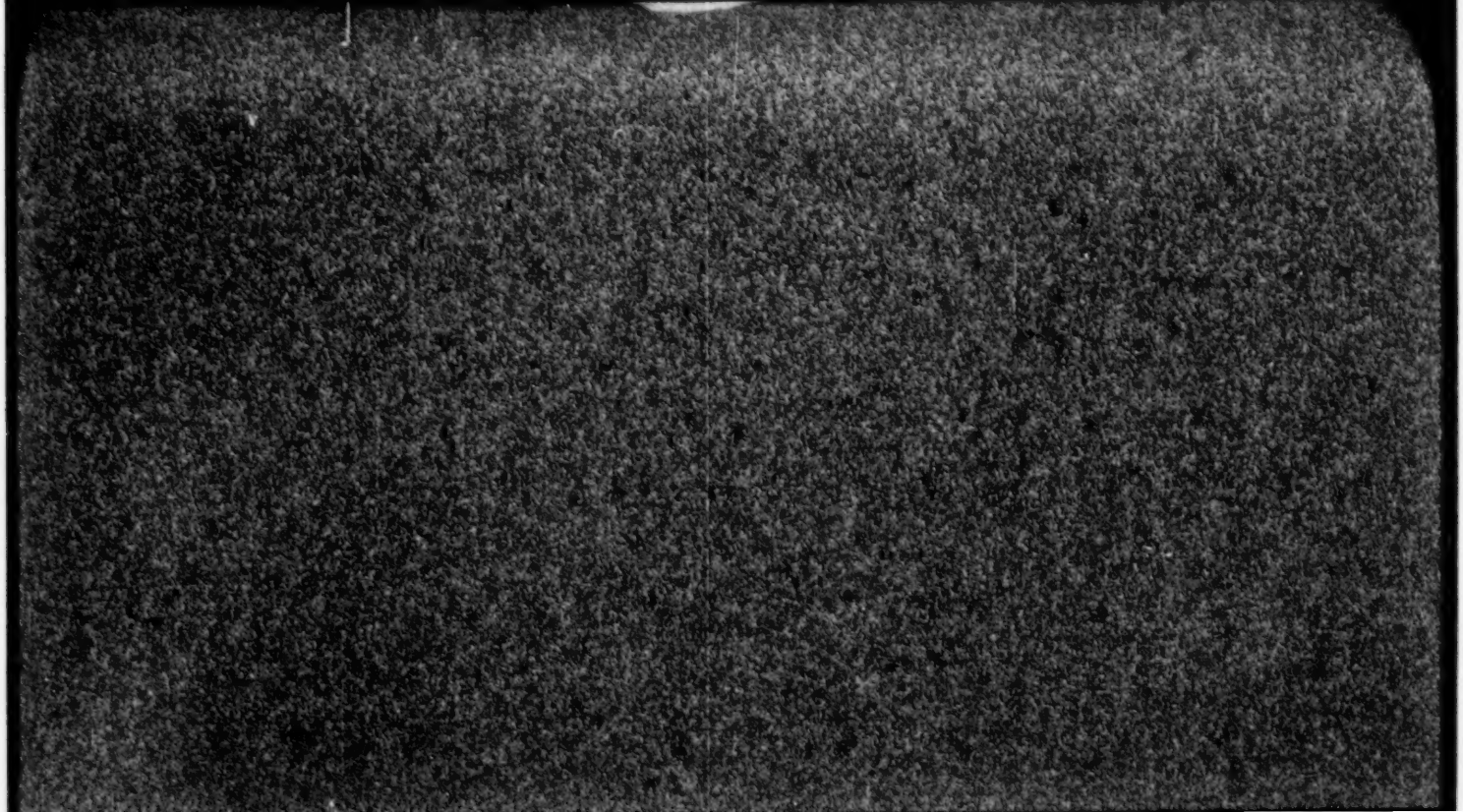

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In the Supreme Court of the United States.

OCTOBER TERM, 1912.

NOS. 31 AND 32.

ORMOND G. SMITH ET AL., TRADING AS Street & Smith, *Appellants*,
vs.
FRANK H. HITCHCOCK, POSTMASTER General, *Appellee*. } No. 31.

FRANK TOUSEY, PUBLISHER, *Appellant*,
vs.
FRANK H. HITCHCOCK, POSTMASTER General, *Appellee*. } No. 32.

APPEALS FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE UNITED STATES.

These are test cases involving the question whether the ordinary "dime novel" is a *book* and hence third-class mail matter, or whether it falls within the designation of "newspapers and *other periodical publications*" and is therefore second-class matter.

The Postmaster General revoked the authority of Street & Smith (appellants in No. 31) to enter the "Tip Top Weekly" and of Frank Tousey, a corporation (appellant in No. 32), to enter "Work and Win" at the New York City post office as second-class mail matter, upon the ground that those publications were "books." (Rec., 11.)

The publishers sued to enjoin the Postmaster General from revoking such authority and to compel the Post Office Department to receive and transmit the publications in question as second-class mail matter at 1 cent per pound.

The trial court granted permanent injunctions upon the ground that the Postmaster General had not granted a "hearing" to the publishers before revoking the second-class mail privilege. This decision was reversed by the Court of Appeals of the District of Columbia with directions to dismiss the bills in both suits. (*Hitchcock* v. *Smith*, 34 App. D. C., 521.)

The publishers have appealed.

The facts are undisputed. The cases are similar, being heard by stipulation on the same evidence. For convenience, we will deal with the "Tip Top Weekly" case, *Street & Smith* v. *Hitchcock, Postmaster General*, No. 31.

There are two, and only two, questions presented:

First. Did the Postmaster General (before revoking the second-class mail privilege) grant to the publishers a "hearing" as required by law?

Second. Are the publications in controversy "books," or are they "newspapers or other periodicals?"

FIRST POINT.

The Postmaster General granted to the publishers "a hearing" as required by law.

1. *The law requiring a hearing.* In 1897 the "Tip Top Weekly" was admitted to the mails as second-class matter. (Rec., 9, 14.)

An act of March 3, 1901 (31 Stat., 1099, 1107), provides—

> When any publication has been accorded second-class mail privileges, the same shall not be suspended or annulled until a *hearing* shall have been granted to the parties interested.[1]

2. *The person before whom the hearing is to be held.*—The act does not prescribe before whom the hearing should be had nor the procedure to be followed. All that was designedly left to the Post Office Department to work out.

By express authority of law, the Postmaster General assigned to Mr. A. L. Lawshe, the Third Assistant Postmaster General,

> "The classification of mail matter;"

and further provided that Mr. Bacon, the "Chief of Classification Division" (an office created by the

[1] The power of the Postmaster General to destroy a magazine by withdrawing the second-class privileges is practically not reviewable by the courts except in case of fraud or mistake of law; and to avoid a possibly hasty exercise of such power, the act of March 3, 1901, was passed so as to afford the publishers an opportunity to present to the Postmaster General any arguments or facts they desired, before he took final action.

act of March 3, 1901, *supra*), should have especial charge, under the Third Assistant Postmaster General, of—

> the determination of the admissibility of publications to the second class of mail matter, and their *right to continue therein*.[1]

3. *The notice of the hearing.*—On May 17, 1907, Mr. Lawshe wrote to the publishers that in accordance with the above act of March 3, 1901, they would be granted a hearing at his office on June 11th at 2 p. m. to show cause why the second-class mail privileges should not be revoked and third-class rates charged the "Tip Top Weekly" upon the ground—

> "That the issues of the 'Tip Top Weekly' do not constitute a newspaper or other periodical publication" as required by the law governing second-class mail matter, "but are in fact books," which are third-class matter. (R. 9, 148.)

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[1] Rev. Stat., § 161; Postal Laws and Regulations (Ed. 1902), which provides (§ 6, 19, subsec. 1, 8):

1. "To the Third Assistant Postmaster General is assigned * * * the classification of mail matter."

8. "The Division of Classification of Mail Matter, under the supervision of a chief of division, is charged with the consideration of all questions relating to the classification of matter admissible to the mails, intended or deposited for mailing, including the determination of the admissibility of publications to the second class of mail matter and *their right to continue therein*."

The classification of mails is an administrative act, and the hearing provided for is a hearing of a kind appropriate to the proper discharge of administrative functions. The hearing was to be by the department and not by a court. It required notice and opportunity to present evidence and argument, but it did not require all the formalities of judicial procedure. That legal questions were to be determined does not alter the case. (*Reetz* v. *Michigan*, 188 U. S., 505, 507; *The Japanese Immigrant case*, 189 U. S., 86, 101.)

The notice in full is printed in the margin.[1]

It will be observed that the notice does not say that the hearing will be "by" or "before" the Third Assistant Postmaster General, but only that it will be "*at* the office of the Third Assistant Postmaster General."

It would be difficult to frame a notice that would state more specifically the precise object of the hearing. It cited the act requiring the hearing; it fixed the time and place of hearing; it named the publication; it cited the act defining second-class and third-class mail matter; it stated that the "ground" of the proposed revocation was that the publications were not a "newspaper or other periodical publication" as required by the act governing second-class

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[1] Note—

POST OFFICE DEPARTMENT,
THIRD ASSISTANT POSTMASTER GENERAL,
DIVISION OF CLASSIFICATION,
Washington, May 17, 1907.

PUBLISHERS OF THE TIP TOP WEEKLY,
New York, N. Y.

SIRS: You are hereby notified that, in accordance with the act of Congress approved March 3, 1901 (ch. 851, 31 Stat. L., 1107), *you will be granted a hearing at the office* of the Third Assistant Postmaster General, Washington, D. C., at 2 p. m., on Tuesday, June 11, 1907, to show cause why the authorization of admission of the Tip Top Weekly to the second class of mail matter under the act of March 3, 1879, should not be revoked, and why the third-class rate of postage should not be charged for the transmission of that publication in the mails, *upon the following ground:*

That the issues of the Tip Top Weekly *do not constitute a newspaper or other periodical publication* as required by sections 7, 10, 12, and 14 of the act of Congress of March 3, 1879 (ch. 180, 1 Supp. R. S., page 246), governing "mailable matter of the second class," *but are in fact books*, which, under section 17 of said act, are third-class matter and chargeable when sent in the mails at the rate fixed by law for that class of mail matter.

Your answer, in writing, must be submitted on or before June 11, 1907.

Should you desire to avoid the expense and trouble incident to a trip to Washington, your written answer will be given the same full and painstaking consideration as though you appeared in person or by representative.

Respectfully,

A. L. LAWSHE.

mail, but "are in fact books" under the act governing third-class mail.

The publishers in their bill of complaint aver (R., 6):

> That the question whether the said publication is a periodical publication * * * and therefore * * * second-class matter *is a pure question of law*, to be determined by a *comparison* of the said publication itself with the conditions set out in the said act of March 3, 1879.

The notice was specific in calling attention to the one precise question the department was considering, to wit, whether the "Tip Top Weekly" was a periodical publication or a book; and, indeed, its sufficiency is not seriously questioned in appellants' brief.

4. *The hearing on June 11, 1907.*—The hearing was set for June 11th. The publishers sent their representative, Mr. Heines, a day ahead of time. The events may be thus summarized:

June 10. Mr. Heines called at the office of Mr. Lawshe, Third Assistant Postmaster General, and left with his secretary a sixteen page printed brief on behalf of the publishers. This brief was immediately sent to Mr. Bacon, Chief of the Classification Division. (R., 46, 52, 53, 130, 131.)

June 11. Visit No. 1: Mr. Heines called at the office of the Third Assistant Postmaster General, saw his secretary, who took his card to Mr. Lawshe, who wrote a word of introduction upon it and directed him to be shown to Mr. Bacon, Chief of Classification Division, as the man he would have to see. (R., 47, 53, 122, 130.)

June 11 (Con.) Visit No. 2: Mr. Heines was taken to Mr. Bacon, Chief of Classification Division, had an interview with him, and asked if he had read the brief that had been left with Mr. Lawshe the previous day. Mr. Bacon informed him that he had read it and asked Heines if he had anything else to say on the subject; to which Heines replied that he had nothing else to say. (R., 47, 48, 53, 54, 122, 123, 168–170.)

Visit No. 3: Mr. Heines went back to Mr. Lawshe, but did not see him, as he was still engaged. (R., 48, 53.)

Visit No. 4: Mr. Heines then returned to Mr. Bacon's office and gave him an additional printed pamphlet entitled "*A General Description of the Character and Influence of the Present Day Dime Novels,*" written by a clergyman, with the request that it be treated as a part of the publishers' brief, which was done. (R., 48, 123, 164, 165, 170, 172.)

Mr. Heines returned to New York.

June 12 to July 26. Mr. Bacon and Mr. Lawshe both read the briefs and pamphlets submitted by the publishers; took an opinion from the Assistant Attorney General for the Post Office Department; considered the whole case and reached the conclusion and accordingly *decided* that the "Tip Top Weekly" was not a "newspaper or other periodical publication" as required by law to be entitled to second-class mail privileges, but was a "book," and hence third-class matter. (R., 148, 159–163, 124, 127, 166.)

The order of revocation was then made. (Id.)

The publishers then insisted that the question involved was, as subsequently stated in the bill of complaint, "*a pure question of law*, to be determined by a comparison of the said publication itself with the conditions set out in the said act of March 3, 1879."

There was no question of disputed fact; an argument upon the law, as applied to the publication in evidence, was all that could be made.

The law required that a "hearing" should be granted to the publishers. It is thus defined:

> A listening to facts and evidence for the sake of adjudication. (*Webster.*)
>
> Opportunity to be heard. (*Webster; Century.*)
>
> Attention to what is delivered. (*Webster.*)
>
> Audience. (*Webster; Century.*)
>
> The receiving of facts and arguments thereon for the sake of deciding correctly. (*Merritt* v. *Village*, 8 Hun., 40, 45.)

The Post Office Department was only required to *listen* to what the publishers had to say; to afford them an opportunity to present such views as they might care to submit. The attitude of the department was passive, not active. It was "up to" the publishers to submit their facts and arguments to the department, which was only required to receive and listen to them. The department did so.

In advance of the hearing, the publishers submitted their printed brief to the Third Assistant Postmaster

General.[1] He referred it to the Chief of Classification Division, who was charged, by law, with the determination of the right of publications to continue as second-class mail matter; and he promptly read it.

On the day of the hearing, the publishers' representative, Heines, personally appeared before the Chief of Classification Division (R., 47, 48, 171); ascertained that the latter had already read the brief (R., 48, 169); submitted an additional printed pamphlet (R. 54, 123, 172, 173); and asked to be noted of record as having appeared in response to the citation, which was done (R. 48, 170), was asked if he had anything else to say or submit on behalf of the publishers, to which he replied "No." (R. 123, 127, 165.)

Mr. Heines expressly admitted that he filed no other papers; offered to file no others; had no others to

[1] The cover of the brief was in bold type as follows:

No. 1
In the Post Office Department of
the United States
Tip Top Weekly
Street & Smith, Publishers
New York, N. Y.
Statement and Argument
Response
2:00 p. m. June 11, 1907
to
Citation of May 15, 1907, from
Office of Third Assistant Postmaster General.

It began: "We beg to submit the following response to your citation of May 15, 1907, to show cause why the authorization of admission of our publication, the Tip Top Weekly, to the second class of mail matter should not be revoked."

For 16 pages it argued fully the question of whether the "Tip Top Weekly" was a "periodical publication" or a "book" within the meaning of the postal laws, just as appellants' brief in this court now argues the same point.

file; and had nothing in mind to say other than was contained in the brief filed. (R. 172, 174, 176).

What more in the way of a "hearing" did he want? He certainly did not ask for anything else; and he made no complaint that the department was failing to give him a proper hearing. After the adverse decision, we hear for the first time an objection to the sufficiency of the hearing.

One explanation lies in the fact that Mr. Heines was not a lawyer. He was an old employee in the "dime-novel" factory; he brought his family down with him from New York to Washington for the "hearing;" he seems to have thought he would be the central figure on an important occasion; and his idea of a "hearing" was the precise reverse of what it is. If his present testimony truthfully reflects his views at that time (although he gave no outward indication of such views to Mr. Bacon), he evidently thought a hearing consisted, not in the Post Office Department hearing him, but in his hearing the Post Office Department. As said by the Court of Appeals:

> * * * His real object in appearing before the department was to gain further information concerning the attitude of the department toward the publication mentioned in the citation and not to make an argument before anyone.

Extracts from his testimony, as shown in the margin, show this to be the case.[1]

Mr. Heines seemed to think that it was the duty of the department to question him, rather than his business to present his own case to the department. This is well illustrated by his rebuttal testimony. Mr. Bacon had testified as follows (R., 164):

> Mr. Heines was given an opportunity to make any statement he cared to make and did not seem disposed to make any statement of the matter other than to present this little pamphlet, The Influence of the Dime Novel, and the briefs which he filed.

---

[1] Question. Why didn't you mail that brief from New York?

Answer. Well, I wanted to get a hearing to see what *they* had to say about it. I wanted to come down and leave the brief and get *their answer* and see what *they* had to say about it. (R., 169.)

Answer. I handed him the document and told him I would be in town and would call to-morrow by appointment at 2 o'clock to give him an opportunity to read the paper to see if he had anything to *ask* the next day. (R., 47.)

Question. What occurred between you and Mr. Bacon.

Answer. We looked at one another and I asked him if *he had anything to say to me* and he said no. * * * I asked him if he received the document I left the day before and he said he had it. * * * I told him I was down there to *answer any questions* they might ask me.

Question. What did Mr. Bacon say?

Answer. "I haven't anything to ask." I asked him if he had read it [the brief] and he said "Yes." I said, "Have you anything to ask me," and he said "No." * * * (R., 48.)

Answer. * * * I asked him [Bacon] if he had any questions to ask, and he simply said "No." (R., 53.) He did not ask me anything bearing on the case at all. (R., 170.) I asked him if he had anything to say, and he said "No," that he didn't have anything to say on the subject. (R., 172.)

When Mr. Heines's attention was directed to that testimony, he said (R., 168):

> I gave Mr. Bacon every opportunity. In fact, I tried to draw him out.[1]

Over and over again, Mr. Heines repeats this complaint:

> I was there to answer questions. He had nothing to say. He said he had nothing to say, etc.

The whole matter is explained in his rebuttal testimony (R., 176).[2]

Mr. Bacon testified (R., 123 et seq., 165) that he told Mr. Heines he had read the brief and that it seemed to cover the cases very fully; asked him if he had anything further to say, to which Heines replied that he had not; that Heines asked to have an additional pamphlet considered as part of the record, which was done; that he told Heines the brief and pamphlet would be fully considered and that—

> Mr. Heines was given an opportunity to make any statement he cared to make, and did not seem disposed to make any statement

[1] Question. You say you tried to draw him out. What do you mean by that?

Answer. By asking him if he had read the brief that I left with him the day before and if he had anything to say on it. (R., 173.)

[2] Question. Your complaint is that they did not ask you any questions, is it not?

Answer. Yes, sir.

Question. You felt that because you were not asked questions you did not get a hearing?

Answer. Yes, sir. * * * After hearing our brief, I thought they would have some questions to ask me then.

Question. Your complaint is that you did not have these questions put to you?

Answer. Yes, sir. (R., 177.)

> of the matter other than to present this little pamphlet, The Influence of the Dime Novel, and the briefs which he filed.

The Government submits that the foregoing evidence demonstrates that the publishers were granted a hearing before their privileges were revoked; that they were notified of the time and place and of the precise question involved—"periodical" or "book;" that they briefed that question fully; that they could have introduced any oral or documentary evidence they desired and have orally argued the case before Mr. Bacon, but they preferred to rest the case on the brief.

The fact that if they had employed a competent lawyer instead of sending an old clerk, they might have made a different presentation of their case, does not alter the fact that they had a hearing—and that is all the law requires.

Review of appellants' contention.

When critically analyzed, all of the objections urged by appellants to the sufficiency of the hearing are reduced to the single point that the department did not at or in advance of the hearing state all the arguments or reasons it had in mind for thinking that the "Tip Top Weekly" was a "book" and not a "newspaper or other periodical publication;" and, therefore, that appellants were denied a hearing because they could not present direct counter-arguments but could only—

> set down such things as occurred to them as showing that their publications were periodicals. (Appellants' brief, page 41.)

The department distinctly stated that the ultimate point involved was whether the "Weekly" was a book or a periodical. That was sufficient. The hearing was to be on that point. The department (before making up its mind on the subject) wanted all the light it could obtain. The department was certainly not obliged, *first*, to furnish the publishers with a tentative expression of the various *reasons* for thinking the "Weekly" a book; and, *second*, thereafter to listen to the publishers' counter arguments. For if that were the true principle, then, if after hearing the publishers, a new argument or reason (perhaps suggested in avoidance of some of the publishers' views) occurred to the department, it could not decide the case until it had in turn submitted such new reason to the publishers and had a further "hearing" upon it, and so on indefinitely.

Indeed, at the time of the hearing, the department, like a court, had not presumably made up its mind; and not until after hearing argument did it reach a conclusion; so it would have been impossible at the hearing to tell the publishers all the arguments that seemed to it to have weight.

The publishers' brief submitted to the department concluded as follows:

> If you are not satisfied, we beg a *further* opportunity to present argument, for there is much more that may be urged in support of our contention.

That was a clear recognition of *one* hearing, but asks in advance for a *rehearing* in case of an adverse decision; and as well might counsel at the bar of this court suggest that, "if the argument we now make is not convincing, hear us again before you decide, for we have something more that we could say, and something more to the purpose." The time to make application for a rehearing was after the decision was announced; and entirely applicable here is what was said in *The Japanese Immigrant Case*, *supra*, page 102:

> * * * Whether further investigation should have been ordered was for the officers, charged with the execution of the statutes, to determine. Their action in that regard is not subject to judicial review. Suffice it to say, it does not appear that appellant was denied an opportunity to be heard.

One hearing, however, Mr. Heines had, and just such a hearing as he wanted; and, as said by this court in *Reetz* v. *Michigan*, *supra*, page 508, "if a single hearing is not due process, doubling it will not make it so."

The department having considered all the documents submitted, decided the case.

The publishers did not then ask for a rehearing (as they of course could have done), but on the contrary filed their bill of complaint. We submit that the department acted after due notice and hearing, and that its order should stand unless it is on the merits plainly against the law.

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SECOND POINT.

The issues of the "Tip Top Weekly" are not "newspapers or other periodical publications" within the meaning of the postal laws; but they are "dime novels" and, as such, are "books;" and the Postmaster General's decision to that effect should not be reviewed here.

The postal laws divide printed matter into two classes: Second-class and third-class matter, respectively. (Act Mar. 3, 1879; 20 Stat., 355, 359.)

Second-class matter embraces

> "All newspapers and other periodical publications"

which must also comply with the following requirements, to wit:

> 1. Issued regularly at stated intervals from a known office of publication as frequently as four times a year, bearing a date of issue and consecutive number, and having a legitimate list of subscribers.
>
> 2. Printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications.
>
> 3. It must be originated and published for the dissemination of information of a public character or devoted to literature, the sciences, arts, or some special industry.

The dominant thought was to encourage the diffusion of intelligence on current affairs by cheap postage; to exclude anything like "books," and only to admit strictly "newspapers and *other* periodical

publications." The doctrine of *ejusdem generis* illustrates the character of periodical publications to be included. Not content with the mere use of the term "other periodical publications," the statute further imposed the numerous above requirements, all obviously designed to exclude "books" as distinguished from periodical publications.

The definition of third-class matter further emphasizes that intention.

Third-class matter "shall embrace *books*, transient newspapers and periodicals, circulars, and other matter wholly in print."

The statute is given in the margin.[1] Third-class matter is an "omnibus clause" covering all other

[1] The act of Mar. 3, 1879, after dividing mail matter into four classes, (1) written matter, (2) periodical publications, (3) miscellaneous printed matter, (4) merchandise, thus defines second-class and third-class matter:

SEC. 10. Mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals and as frequently as four times a year and are within the conditions named in sections 12 and 14.

SEC. 14. The conditions upon which a publication shall be admitted to the second class are as follows:

First. It must be regularly issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively.

Second. It must be issued from a known office of publication.

Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications.

Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers. * * *

SEC. 17. Mail matter of the third class shall embrace books, transient newspapers, and periodicals, circulars, and other matter wholly in print (not included in section twelve), proof sheets, corrected proof sheets and manuscript copy accompanying the same, and postage shall be paid at the rate of one cent for each two ounces or fractional part thereof, and shall fully be prepaid by postage stamps affixed to said matter.

By an act of Mar. 3, 1885, postage on second-class matter was reduced to 1 cent per pound.

matter wholly in print. (*Houghton* v. *Payne,* 194 U. S., 88, 97.) The object of Congress was clearly stated by the Court of Appeals of the District of Columbia (R., 192):

> * * * Congress in extending nominal rates of postage to periodical publications, was actuated by a desire to serve the public rather than the publishers. * * * Congress was endeavoring to provide a speedy and inexpensive vehicle of communication among the people, and that when periodical publications were referred to it did not have in mind dime novels. Books and publications like the one here involved may well await a less expensive if less speedy means of conveyance. There is no need for haste, and no apparent reason why the mails should be burdened with them.

The "Tip Top Weekly" complies with all the formal statutory requirements except that it is not "devoted to literature." Conceding for the moment that it even complies with that stipulation, the material question still remains whether it is a "periodical publication" at all. Mere compliance with the statutory requirements does not necessarily make it a "periodical publication" within the meaning and intent of the statute.

In *Houghton* v. *Payne,* 194 U. S., 88, 96, the "Riverside Literature Series" complied with every statutory requirement, but this court held it was not a periodical publication, saying:

> * * * If the fact be that this series becomes a periodical by a compliance with the

conditions of section 14, under which it is entitled to be transmitted as second-class mail matter, we shall be compelled to say that the decree of the court below was wrong.

But while section 14 lays down certain conditions requisite to the admission of a publication as to mail matter of the second class, *it does not define a periodical*, or declare that upon compliance with these conditions the publication shall be deemed such. In other words, *it defines certain requisites* of a periodical, *but does not declare that they shall be the only* requisites. Under section 10 the publication must be a "periodical publication," which means, we think, that it shall not only have the feature of periodicity, but that it shall be *a periodical in the ordinary meaning of the term.*

This was reaffirmed in *Smith* v. *Payne*, 194 U. S., 104, and *Bates & Guild Co.* v. *Payne*, 194 U. S., 106, 107.

Appellants earnestly contend that *Houghton* v. *Payne*, 194 U. S., 88, was erroneously decided and cite a mass of legislative and administrative history to support their claim that Congress intended to admit as second-class matter any publication (regardless of the character of its contents) that merely conformed to the requirements laid down in the statute. (Brief, p. 80; 59–81.) We can only reply that Congress drew the line between periodicals and books; that *Houghton* v. *Payne* and *Bates & Guild Co.* v. *Payne* correctly explained that distinction, and we can not add to the force of the reasoning in those cases.

This then leaves open for determination the question—and it is the only question in the case—whether the "Tip Top Weekly" is a "periodical in the ordinary meaning of the term." That question must be determined by the contents of the publication.

The Government submits that it is not a periodical.

I. *The decision of the Postmaster General is conclusive and should not be reviewed.*

In *Bates & Guild Co.* v. *Payne*, 194 U. S., 106, the Postmaster General decided that a certain publication, "Masters in Music," although complying, just as does the "Tip Top Weekly," with all the specific requirements mentioned in the statute, was nevertheless in reality not a periodical. This court sustained his decision as final, saying:

> Conceding the principle established in the two cases just decided [*Houghton* v. *Payne* and *Smith* v. *Payne*] to be that the fact that books published at stated intervals and in consecutive numbers do not thereby become periodicals, even though in other respects they conform to the requirements of section 14, cases may still arise where the classification of a certain publication may be one of doubt. Such is this case. But we think that, although the question is largely one of law, determined by a comparison of the exhibit with the statute, there is some discretion left in the Postmaster General with respect to the classification of such publications as mail matter, and that the exercise of such discretion ought

not to be interfered with unless the court be clearly of opinion that it was wrong.

The Postmaster General is charged with the duty of examining these publications and of determining to which class of mail matter they properly belong; and we think his decision should not be made the subject of judicial investigation in every case where one of the parties thereto is dissatisfied. The consequence of a different rule would be that the court might be flooded by appeals of this kind to review the decision of the Postmaster General in every individual instance. * * *

The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing.

Upon this principle, and because we thought the question involved one of law rather than of fact, and one of great general importance, we have reviewed the action of the Postmaster General in holding serial novels to be books rather than periodicals; but it is not intended to intimate that in every case hereafter arising the question whether a certain publication shall be considered a book or a periodical shall be reviewed by this court. In such case the

> decision of the Post Office Department, rendered in the exercise of a reasonable discretion, will be treated as conclusive.
>
> While, as already observed, the question is one of doubt, we think the decision of the Postmaster General, who is vested by Congress with the power to exercise his judgment and discretion in the matter, should be accepted as final.

As there, so here: The Postmaster General on comparing the "Tip Top Weekly" with the statutory requirement that it must be a "periodical publication" in the ordinary meaning of the term, reached the conclusion and decided it was not a periodical.

Is not that conclusive? Is this court to review his action on every periodical that is admitted to or excluded from one class rather than another class of mail matter? Argument can not strengthen the plain language above quoted.

In their argument before Mr. Lawshe the publishers urged that "each issue contains a complete story," to wit, a "dime novel." Now, the Postmaster General determined that such a publication was not made for the dissemination of information of a public character, was not devoted to literature, the sciences, arts, or any special industry, and that it was not a periodical in the usual and accepted sense of the term.

The judgment below should be affirmed upon the Postmaster General's finding.

If, however, this court is of the opinion that it should exercise its power to review that decision, then the Government submits:

II. *Each issue of the Tip Top Weekly is a dime novel complete in itself—a "book," neither more nor less. Its contents so demonstrate.*

In every statute for more than 60 years the postal laws have distinguished "books" from "periodicals" in the matter of postage rates. Periodicals are in a favored class. Books and other printed matter generally (music, circulars, advertisements, etc.) are in another class.

The insistent distinction means something.

If a particular publication wants to be in the highly favored class it must prove its title thereto or be consigned to the other class. As the same publication can not be both second and third class, to fall within the second, the highly favored class, it must possess the features described as those of that class, and the characteristics of the third class must be absent.

Each issue of the "Tip Top Weekly" contains about 30,000 words, is about 8 by 11 inches in size, and consists of 32 pages, exclusive of the covers. The front cover is taken up with a highly colored picture illustrating some exciting incident of the story.

The contents consist of a single story, complete in itself, beginning with Chapter I and running through a number of chapters. At the conclusion appears

the legend "*The End.*" That is all there is to it.[1] It is a complete novel.

One man, Burt L. Standish, is the author of all the stories; and the hero is Frank Merriwell or his brother Dick, just as Sherlock Holmes is the hero of Conan Doyle's many stories. Each story is one of adventure, the range extending from aquatics to aerial performances, and the perils encountered and escaped are threatened by man and brute and by bird and beast. We have the fierce lion of Numidia and the bucking broncho from the staked plains of Texas. We meet with them, however, not the one on his native prairie and the other in his native jungle, but both in the wastes and wilds of the eastern coast of Maine.

In the margin will be found a list of titles to other issues of the Weekly; and also the titles in the *Tousey* case, where the hero is Fred Fearnot, and, as becomes his doughtier name, his adventures are of a more thrilling nature.[2]

[1] Two or three pages at the end are taken up with an announcement of the story to appear in the next number; some "Applause," that is, commendatory letters purporting to come from its readers; a few questions and answers on athletics; and an advertisement of the Weekly and its back numbers as collected and published in book form. See Exhibits in custody of the marshal of this court with such titles as "Dick Merriwell, Lion-Tamer or Ate, Queen of the Air;" "Dick Merriwell's District, or Betrayed by a Blotter," and "Dick Merriwell's Debt or Settling the Score with Smoketown."

[2] Frank Merriwell in Arizona, or, the Mysteries of the Mine.
Frank Merriwell's Friend, or, Muriel the Moonshiner.
Frank Merriwell's Double, or, Fighting for Life.
Frank Merriwell Meshed, or, the Last of the Danites.
Frank Merriwell in Gorilla Land.
Frank Merriwell's Magic, or, the Pearl of Tangier.

What, then, are these successive issues of the "Top Top Weekly" and "Work and Win"? Novels.

Frank Merriwell in London, or, the Grip of Doom.
Frank Merriwell's Venture, or, Driven from Armenia.
Frank Merriwell's Vow, or, After Big Game in Ceylon.
Frank Merriwell in Japan, or, The Sign of Avenger.
Frank Merriwell's Game, or, Snaring the Sharper.
Frank Merriwell's Drift, or, With the River Drivers.
Frank Merriwell's First Part, or, the Start as an Actor.
Frank in Advance, or, the Adventures Ahead of the Show.
Frank Merriwell's Own Company, or, Barnstorming in the Middle West.
Frank Merriwell's New Venture, or, the Finding of Elsie.
Frank Merriwell's Advancement, or, the Engineer of the Mountain Express.
Frank Merriwell Held Up, or, The Robbery of the Mountain Express.
Frank Merriwell as a Ferret, or, Tracking the Train Wreckers.
Frank Merriwell's Peril, or, the Smugglers of the Border.
Fred Fearnot's Treasure Hunt, or, After the Aztecs' Gold.
Fred Fearnot and the Cowboy King, or, Evelyn and the "Bad" Men.
Fred Fearnot and "Roaring Bill," or, the Wickedest Boy in the West.
Fred Fearnot and the Boy Prospector, or, the Secret Band of the Indian Gulch.
Fred Fearnot and the Diamond Queen, or, Helping the Treasury Department.
Fred Fearnot and the White Masks, or, Chasing the Chicago Stranglers.
Fred Fearnot and the Snake-Charmer, or, Out with the Circus Fakirs.
Fred Fearnot Held Back, or, the Time Terry Failed Him.
Fred Fearnot and the Girl of Gold, or, the Female "Wizard" of Wall Street.
Fred Fearnot and "Long Duke," or, the Toughest Man in Texas.
Fred Fearnot and the Silver Syndicate, or, Beating the Wall Street Sharks
Fred Fearnot and the "Wharf Rats," or, Solving a North River Mystery.
Fred Fearnot and "Ned, The Newsy," or, the Sharpest Boy in New York.
Fred Fearnot's Football Boys, or, Winning on the Gridiron.
Fred Fearnot and the Range Robbers, or, Seeing Justice Done.
Fred Fearnot's Deal in Diamonds, or, The Strange Man from Africa.
Fred Fearnot and the Mill Girl, or, the Factory Gang of Fairdale.
Fred Fearnot's Snow-Shoe Trip, or, A Tough Time in the Rockies.
Fred Fearnot's Search for Evelyn, or, How She Got Lost.
Fred Fearnot's Streak of Luck, or, The Gold Gang of Gilt Edge.
Fred Fearnot and the Kentucky Girl, or, Down in the Blue Grass Country.
Fred Fearnot and "Nervy Ted," or, the Pluckiest Boy in Wall Street.
Fred Fearnot and the "Yellow Queen," or, the Mysterious Sign of the Seven.
Fred Fearnot's Range Riders, or, Hunting Down the Outlaws.
Fred Fearnot and "Pittsburg Pete," or, Lively Times in the Oil Country.

Each issue is a complete dime novel. The publishers in their brief before the Third Assistant Postmaster General declared that "each issue contains a *complete story*" and to sustain its claim as proper literature filed as part of their argument a pamphlet entitled "A General Description of the Character and Influence of the Present Day *Dime Novels.*"

So it is conceded, nay, actually urged by the publishers, that each issue is a dime novel complete in itself.

1. Does the fact that separate complete novels are thus issued at regular intervals, dated, numbered consecutively and printed in unsubstantial form, etc., constitute the collective series a periodical? Of course not. As said in *Houghton* v. *Payne*, "the fact that a publication is issued at stated intervals, under a collective name, does not necessarily make it a periodical." As pointed out (page 18, *supra*) *Houghton* v. *Payne*, 194 U. S., 88, 96; *Smith* v. *Payne*, 194 U. S., 104; and *Bates & Guild Co.* v. *Payne*, 194 U. S., 106, 107, decided definitely that mere compliance with all such express formal statutory requirements did *not* constitute the publication a periodical.

2. Whether a given publication is a periodical must be settled by a determination whether the *contents* constitutes it a periodical in the ordinary meaning of the term.

Three prior decisions of this court are conclusive of this controversy.

In *Houghton* v. *Payne*, 194 U. S., 88, the Riverside Series was issued in strict compliance with all the

statutory requirements. Each issue was a single novel or story, or a collection of short stories or poems, and most were reprints of standard works of Thackeray, Whittier, Lowell, Emerson, etc., and of high literary value. It was held that such a series (while strictly conforming as does the "Tip Top Weekly" to all the requirements mentioned in the statute), was not a "periodical publication" within the meaning of the postal laws, because the contents of the separate issues were not what are ordinarily understood by a periodical.

In *Smith* v. *Payne*, 194 U. S., 104, the same firm of Street & Smith (appellants in No. 31) similarly issued as a periodical "The Medal Library," which was made up of a reprint or collection of several issues of the "Tip Top Weekly," bound together to make a fair sized volume. It was held that they were not periodical publications.

In *Bates & Guild Co.* v. *Payne*, 194 U. S., 106, a publication called "Masters in Music" was issued as a monthly magazine, complying with all the statutory requirements. Each issue was complete in itself, the contents being devoted to a portrait, life and critical estimate of, and musical selections from, some great musician. This court upheld the action of the Postmaster General in refusing it admission as second-class mail, saying (p. 110):

> "In the case of Masters in Music the question really is whether a pamphlet, complete in itself, treating of the work of a single master, with a greater part of the pamphlet devoted

> to specimens of his genius, shall be controlled by the cover, which declared that the numbers will be issued monthly, at a certain subscription price per year."

The rule to be extracted from those cases is that mere compliance with what may be called the physical, commercial and literary tests prescribed by the statute (while absolutely essential to be complied with) is not alone sufficient to constitute a publication a "periodical" within the postal laws; but that the contents must be such as make it a periodical within the ordinary meaning of that term.

How then are we to distinguish between a periodical and other publications?

It is difficult to formulate any precise definition which will cover all cases, but as said in *Houghton* v. *Payne*, 194 U. S., 97, "while it may be difficult to draw an exact line of demarcation between periodicals and books it is usually, though not always, easy to determine within which category it falls, if the character of a particular publication be put in issue."

Without regard to any attempted definition, we think it must strike the mind that "dime novels" issued weekly do not constitute a periodical.

In the margin will be found a quotation from *Houghton* v. *Payne*, 194 U. S., 88, 97, where some of the distinctions between periodicals and books are pointed out, but the classification there given does

not pretend to be complete nor adequate to cover all cases.[1]

[1] In *Houghton* v. *Payne*, 194 U. S. 88, 97, it is said:

"A periodical, as ordinarily understood, is a publication appearing at stated intervals, each number of which contains a variety of original articles by different authors, devoted either to general literature of some special branch of learning or to a special class of subjects. Ordinarily each number is incomplete in itself, and indicates a relation with prior or subsequent numbers of the same series. It implies a continuity of literary character, a connection between the different numbers of the series in the nature of the articles appearing in them, whether they be successive chapters of the same story or novel, or essays upon subjects pertaining to general literature. If, for instance, one number were devoted to law, another to medicine, another to religion, another to music, another to painting, etc., the publication could not be considered as a periodical, as there is no connection between the subjects and no literary continuity. It could scarcely be supposed that ordinary readers would subscribe to a publication devoted to such an extensive range of subjects.

"A book is readily distinguishable from a periodical, not only because it usually has a more substantial binding (although this is by no means essential), but in the fact that it ordinarily contains a story, essay or poem, or a collection of such, by the same author, although even this is by no means universal, as books frequently contain articles by different authors. Books are not often issued periodically, and, if so, their periodicity is not an element of their character. The reason why books of the Riverside Literature Series are issued periodically is too palpable to require comment or explanation. It is sufficient to observe that, in our opinion, the fact that a publication is issued at stated intervals, under a collective name, does not necessarily make it a periodical. Were it not for the fact that they are so issued in consecutive numbers, no one would imagine for a moment that these publications were periodicals and not books. While this fact may be entitled to weight in determining the character of the publication, it is by no means conclusive, when all their other characteristics are those of books rather than those of magazines.

"The fact that these publications are not bound when issued or intended for preservation, is immaterial, since in France and most of the Continental countries nearly all books, even of the most serious and permanent character, are usually issued in paper covers, thus leaving each purchaser to determine for himself whether they are worth a binding of more substantial character and preservation in his library. It is true that in this subdivision of section 14 it is said that a periodical must be without such substantial binding as to distinguish printed books for preservation from periodical publications, but it is by no means to be inferred from this that to constitute a book the publication must have a substantial binding."

Of course there may be and doubtless are some publications which are universally conceded to be periodicals in the most genuine sense, and yet which in some one or more particulars may not conform to the suggestions in *Houghton* v. *Payne*. Nevertheless, a publication consisting solely of issues, each of which is a novel complete in itself and always of boyhood adventure, is not a periodical but a series of novels.

If (*a*) reprints of famous novels and poems, and of collections of dime novels, and (*b*) original articles upon great musicians, do not constitute a periodical, can it be said that a series of single detective stories—dime novels—is a periodical?

The only difference between the Riverside Series and the "Tip Top Weekly" is that one is a reprint and the other an original; and appellants urge that the cases of *Houghton* v. *Payne* and *Smith* v. *Payne* are distinguishable from the case at bar because they involved the *reprint* of previously published articles, whereas the "Tip Top Weekly" consists of original articles appearing for the first time in the current issue. But the original character of the composition can not be the test, for "Masters in Music" was, in large part at least, an original composition. (*Bates & Guild Co.* v. *Payne*, supra.)

It was not the *reprinting* feature that made the Riverside Series and the Medal Library books. It was the inherent nature of their contents. Their contents were books; originally books; always books, no matter how published or how disguised.

For example, Longfellow's "Evangeline" (one of the Riverside Series) was first published as a book. When republished in the series it was still a book, not *because* it was a reprint, but because it was originally and always a *book*. Suppose "Evangeline" had been first published in paper covers, dated and numbered as one issue of the series. Would it not have been a book just the same?

And, therefore, *reprinting* not being the determining factor, the cause of the exclusion in *Smith* v. *Payne*, 194 U. S., 104, of numbers of "Tip Top Weekly" issued in the Medal Library must have been because they were *books*. If the dime novel tales of Frank Merriwell's marvelous adventures were books in *Smith* v. *Payne*, why are not similar tales of his adventures books today?

Appellants' counsel urge that because the issues of those early publications ("*Spectator*," "*Tatler*," "*Rambler*") which originally gave the word "periodical" to the English language were chiefly by one author on one subject, *any* publication now by one author on one subject and issued at stated intervals is necessarily a periodical within the meaning of the postal laws (brief, p. 99 *et seq.*).

It does not so follow; both on account of the difference in the character of the contents, as will be presently pointed out, and because the word periodical has come to have a meaning to-day different from the characteristics of those first periodicals.

From the first monthly magazine established on this side of the Atlantic bearing the formidable title

of "*The General Magazine and Historical Chronicle of all the British Plantations in America,*" which Benjamin Franklin issued in 1741, down to the days of "Everybody's" the characteristic of American periodicals has been short miscellaneous contributions by a variety of authors. In 1851, Robert Bonner acquired the old New York *Ledger* (an old commercial paper), and at once excluding all news and business, he substituted a series of continued and short stories, each issue containing several. He had numerous contributors, such as Edward Everett, Wm. Cullen Bryant, Horace Greeley, Mrs. Stowe, and Henry Ward Beecher. He was enormously successful as the first person to combine a very cheap paper with an enormous circulation.

His success brought many imitators in the field; the next step being such publications as "*The Fireside Companion,*" containing one story that stopped at the most thrilling moment and was "continued in our next."

And so Bonner's idea has finally lapsed into the dime novel, which is a vilely written story of exciting adventure, whose eager purchasers are servant girls and office boys.

The Tip Top Weekly is one of that class, seeking by the subterfuge of a weekly issue to obtain the rates of postage that were designed only to apply to such publications as performed the real function of a periodical, to wit, the diffusion of knowledge among the people on matters of fairly current interest.

Apropos of the differences between novels and periodicals, it is to be observed that the distinguishing feature of the periodical is its current continuity. This is most marked in the daily newspaper. We read it and cast it aside, however interesting its collection of news or well written its editorials. It deals with passing events and it passes with those events. In a few large libraries it is filed away for the use of the future historian, but the general reader has no place in his home for the great folios that would result from binding his daily paper into permanent form. He simply awaits the next issue. So the best newspaper is as to each of its issues ephemeral because its subject matter is of transient concern. But it has continuity through its succession of issues.

Some things appropriate to a book may appear in a periodical without changing the nature of the publication under the postal laws. A daily newspaper may contain a chapter of a story or an entire story; it may contain selected matter from standard works of literature; or a great poem, destined to enduring renown, may first appear in its columns, as was the case with Kipling's Recessional. The newspaper is none the less, nay, it may be all the more, a newspaper by reason of these things, for that which has permanent interest has present interest also. And so with a magazine, as when parts of "The Autocrat of the Breakfast Table" first appeared in the Atlantic Monthly. But if the publication be simply of a

story, or of a poem, if the story or the poem constitute the publication, whether it is its first appearance or its tenth, it is not a periodical, but rather a book.

The magazine, as it is less frequent, is less transient in interest than the daily. It is neither written nor read in such haste. It remains longer upon the library table, more frequently finds its way to library shelves. Still its interest is transient, and in its topics we expect a certain timeliness. There may be, and in the magazines most familiar to us there is, literary matter which is not transient. Novels of the best writers may run through the numbers, to be afterwards published in book form, as Du Maurier's "Trilby" in Harper's Magazine; and in this way much of our poetry makes its first appearance. But this is only one feature of the literary magazines, and the use of generations has determined its propriety. But however much there may be in the magazine that is constant, there is much that is current. Matters of present, passing interest, although not so ephemeral as much which fills the columns of the daily papers, are dealt with, the progress of the arts and sciences, the changes in customs and manners, the flux of things. And this is true not only of the magazines of general scope, but as well of the journals of the trades and professions, and of the various cults and creeds, and of the journals of fads and fancies. Even the railway guide has this present, passing interest. However much it may repeat itself in its various issues, and even though during some months there should be no

change in any railway schedule in the United States, the current number is of present interest because it informs us what the schedules are now, and the preceding number has lost its interest because it deals with what is now past and may have been greatly changed.

The quarterly, as we would infer from its periods of publication, is a more serious journal. Nothing engages its attention which can not live throughout three months. But while its subjects are of deep, they are still of present, interest. Taking up at random a number of the North American Review—that of January, 1869, when it was still a quarterly—the contents were found to be very distinctly of contemporaneous interest, and running through the numbers upon either side of 1869 there was found a continuity of design and a certain individuality, not of authorship either, notwithstanding the great variety of topics treated.

Books, on the other hand, are supposed to be of more permanent interest, although they frequently are not, for thousands of stories have appeared in book form, even in a covering of full levant, and have gone to the paper mills, stripped of their covering, to be mashed into pulp, short lived, not because they were periodicals, but because they were *literary trash*, because they possessed nothing of permanent interest, while many a periodical, because it grasped the substantial in the passing show of life, has become a book.

A periodical may become a book, but a book can not become a periodical.

Appellants urge that the Weekly is a periodical because "the successive numbers deal with the same group or knot of characters, and are linked together in the usual way of fiction, by a sequence of events." (Appellants' brief, p. 108.) Conceding that to be true (although in point of fact each issue is finally complete in itself), it does not prove the Weekly to be a periodical.

The larger novels of Dickens, Thackeray, and Lever were originally issued serially in 20 monthly parts, and sold at a shilling the part. The green paper covered numbers of "Pickwick Papers," the yellow covered numbers of "Vanity Fair," and the pink ones of "Charles O'Malley," as they stand upon the shelves of collectors, present every outward semblance of periodicals as much as do the issues of "Tip Top Weekly" and "Work and Win." "Pickwick" is a book now, and it was a book when its monthly installments were so eagerly awaited by the Captain in Cranford and when for another good soul death was diminished in its terror, because of the physician's assurance that it would not come until there had been another coming of Sam Weller. Every number of the Papers was a book, incomplete indeed, but a book, as the "Mystery of Edwin Drood" is a book, although the pen of the author was forever stayed at the sixth number.

What is the difference between "Pickwick Papers," appearing at intervals of a month, and "Tip Top Weekly?" It seems like sacrilege to ask the question. But, remember, we are asking it only for

the purposes of postal classification, and for this purpose there is no difference; they are both books and not periodicals. And this is so, although Frank Merriwell is not very like Sam Weller.

And in response to the suggestion that because the Merriwell boys reappear in different issues, the Weekly is a periodical, we reply that Thackeray makes the Beatrix of Henry Esmond reappear as the Baroness Bernstein of the Virginians, and by the introduction of George Warrington in Pendennis exhibits to us descendants of Henry Esmond in the fifth generation. And something more there is of this reappearance of characters in Thackeray, but not a great deal. His genius was not equal to making one man the hero of five hundred stories. Dickens revived Pickwick and the Wellers in connection with another story, but he soon permitted them to retire and let the story of Little Nell run to its close without interruption. And though Pickwick and the Wellers were thus brought to life again in "Master Humphrey's Clock," the name under which "Old Curiosity Shop" and "Barnaby Rudge" were first published, and although the "Clock" appeared weekly and regularly for 80 weeks and in paper covers, it was not a periodical but a book.

So the mere reappearance of characters does not prove appellants' case. Sherlock Holmes appeared first in "A Study in Scarlet" in *Beeton's* Christmas Annual in 1886, but it was later published as a book when the interest of the people created the demand.

And so when, after that wonderful series of intricate cases, he disappeared over the Alpine precipice locked in the embrace of Professor Moriarty, the public were not satisfied and he reappeared in "The Adventure of the Empty House" to thrill us again with the story of his miraculous escape and to be of use in solving the mysteries of the "Second Stain," "The Dancing Men," the "Golden Pince-nez" and the "Hound of the Baskervilles." But the tales of Sherlock Holmes are books assuredly and not periodicals, even though in some instances they first appeared as one feature in (not the whole of) a magazine.

Indeed, the appearance of Frank Merriwell as the hero in five hundred different and complete stories of adventure, with no sign that the fancy from which the stories spring has lost its fertility, is conclusive that the stories are isolated tales of adventure, in which the incidents and not the individuals are of importance.

Each story is complete in itself, and is intended to be so. It is advertised and sold as such. We may begin reading anywhere in the series and end anywhere, and we may go forward or backward. The names in the stories have no significance. The "Work and Win" names would serve the "Tip Top Weekly" perfectly. Frank Merriwell and Fred Fearnot could change names and adventures as easily as caps and coats. The very number of the stories, several hundred, in which each so-called protagonist appears, demonstrates the want of individuality in the characters.

Appellants complain that certain other publications [Burr McIntosh Monthly, Masters in Art, Lippincott's Magazine, Advance Sheets, U. S. Supreme Court Reports, etc. (R. 69, 71; brief, p. 86, 104–107)] are admitted as second-class matter which are alleged to be substantially like the "Tip Top Weekly." Brevity forbids any lengthy explanation of the essential differences between the Weekly tales of Fred Fearnot's and the Merriwell boys' adventures in "Chasing the Chicago Stranglers," "Tracking the Train Wreckers," and being "Betrayed by a Blotter," and, for example, the reports of this court's decisions in the "Advance Sheets." The Government will leave the point for decision upon an inspection and comparison of the two publications; and despite appellants' suggestion on page 105 of their brief that it would be very extraordinary for the "Advance Sheets" to be designated "a variety of original articles by different authors," we have shared the common opinion that they were certainly by different authors and are sure that not a few unsuccessful litigants have at times even thought they were "original." In any event, it does not help appellants' case even if some other publication is erroneously admitted to the mails.

The presumption, of law and of fact, is that the Postmaster General has done his duty faithfully and impartially; that if there were other publications enjoying second-class privileges, when not entitled to them, the privileges have been withdrawn. The Postmaster General had to deal with each individual

case and decide that as his judgment of the merits required. He has done that in this case, and his action and the action of the Court of Appeals approving it should be affirmed.

The suggestion that the Postmaster General is estopped or bound by the action of his predecessors, and that he must accept their construction of the law as to what constitutes a periodical, is disposed of by *Houghton* v. *Payne*, and need not be discussed here.

Appellants erroneously assume that the Government's objection is because there is but one author of all the stories and only one story to an issue, and cite the "Spectator," "Tatler," and "Rambler," as instances of classic periodicals chiefly by one author and with but a single article to the issue. (Brief, p. 84, 100–104.) We do not deny the quality of "periodicals" to this weekly, because all the issues are written by one man. The "Tatler" was a periodical from the beginning, and while Steele was yet writing all the numbers, as much so as it was after he had called Addison to his aid, and as much so as were the "Spectator" and the "Guardian." As was said of Steele, "He brought his daily observations of life, his gleanings in society, his early studies, his critical estimates of authors and actors, and his reflections on the destiny and duty of his fellows, to bear on his essays—now drawing a pathetic picture, and now entering a satirical protest, advocating amelioration in manners, suggesting improved standards, winning to more wise pastimes and more gracious intercourse." The "Tatler," the "Specta-

tor," and the "Guardian," as their issues appeared, whether the number was written by Steele or Addison, or whether both contributed, were periodicals in the true sense. The contents made them so. They justified the motto—

> Whate'er men do, or say, or think, or dream,
> Our motley paper seizes for its theme.

There was in these publications the essential variety of everyday life, as much so as in the newspaper of today. Their high literary quality did not change their nature in that respect. The subject matter was of current and varied interest. The literary quality fixed that interest and made it constant, permanent.

The "Spectator" in its day, and as it appeared at its short, stated intervals was a periodical in form and in fact. It contained the important news, it commented upon the manners and morals of the time, and found its inspiration and its texts in passing events. The sequence of its numbers was a natural current one. Today the "Spectator" is a book and is published as one. And to republish it at the present time, serially and in its original sequence, would not make a periodical of it any more than to publish the "Decline and Fall of the Roman Empire" at regular intervals, in chapters, would make that a periodical. The number of the "Spectator" or the chapter of Gibbon would have no sort of relation to the interests of the time when it made its appearance. Publication in the original order of numbers or chapters would be essential to the use of either as a book, and for that reason the order would be observed.

That there is but one author of "Tip Top Weekly" does not make a periodical of the publication, because what he writes has no variety of topic. It is adventure and adventure, and nothing but imaginary adventure, each complete in itself. It is not devoted to literature, nor to any special branch of learning, nor to a special class of subjects. There is no relation of any one number with any prior or subsequent number of the same series.

And so it is that there is no occasion—not even that which would exist in the republication of the "Spectator"—for any particular sequence in the series. Look at the titles, not Tip Top Weekly No. 1, Tip Top Weekly No. 2, etc., but the real titles, those of the stories. They suggest no order. It makes no difference as to the particular date when Frank Merriwell solved the "Mysteries of the Mine," or "Snared the Sharpers," or was "Barnstorming in the Middle West," or succeeded in the "Finding of Elsie," or "Tracked the Train Wreckers." He could do them, or any of them, one day as well as another, and one week would serve as well as another for telling the story. The only element of unity in the series is the monotony of nomenclature, the result of sheer repetition; but this monotony does not give the continuity of literary character which makes the magazine or review.

The single number lacks the variety and the series the unity which are essential to constitute a periodical in the ordinary sense of the term. These things are books and complainants deal with them as such.

They publish back numbers, by reprinting them in book form and binding two or three numbers into one volume, the bound series being known as the "Medal Library." Here, then, we have the same thing published in book form and in periodical form. It is the same thing as to contents in both. And it is not like the "Spectator," a periodical which has become a book, whose interest, when published, was current, and from its literary quality and historic value has become constant. The bound volumes of the "Medal Library" are just as current to the boy who has not read them as is the last unbound issue of the Weekly. The volume of the "Medal Library" probably will not find as large circulation as the issue of the Weekly, but that is because it has been published before and has been read by many, and in this respect it does not differ from any other cheap novel.

The "Tip Top Weekly" deals with fiction, and only with fiction, and that is the subject matter of a great majority of the books which issue from the press of to-day. It appeals, as does every work of fiction, to the imagination. Its own peculiar appeal is to the imagination of youth, and its every issue makes the same kind of appeal. It has no current quality, and the interest of any and every issue is present only as it is ever present—perennial. And so we submit that each of these various tales of Frank Merriwell's adventures, as well as those of Fred Fearnot, is a book; and we believe we do no injustice to complainants when, adopting the language of this court in *Houghton* v. *Payne*, we say

that "the reason why books of the 'Tip Top Weekly' and 'Work and Win' series are issued periodically is too palpable to require comment or explanation."[1]

CONCLUSION.

The decrees below should be affirmed.

WM. MARSHALL BULLITT,
Solicitor General.

AUGUST 15, 1912.

[1] The last ten pages of this brief were largely the work of the former Solicitor General, Frederick W. Lehmann.

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